84-1087

No.

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# In the Supreme Court of the United States

**October Term, 1984**

CLEVESTER DAVIS, JIMMIE LEE KING,
VIRGINIA KING, *et al.*,
*Cross-Petitioners.*

vs.

AVCO FINANCIAL SERVICES, INC.,
*Cross-Respondent.*

## CROSS-PETITION FOR A WRIT OF CERTIORARI
**To the United States Court of Appeals**
**For the Sixth Circuit**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether promissory notes are "securities" within the meanings of the Securities Act of 1933 and the Securities Exchange Act of 1934 when they are solicited and issued in a loan transaction for the specific purpose of purchasing a security.

2. Whether under certain circumstances reckless behavior is sufficient for civil liability under §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.

3. Whether Rule 60, Fed.R.Civ.P., can be used to perfect an otherwise untimely appeal.

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# No.

# In the Supreme Court of the United States

**October Term, 1984**

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CLEVESTER DAVIS, JIMMIE LEE KING,
VIRGINIA KING, *et al.*,
*Cross-Petitioners,*

vs.

AVCO FINANCIAL SERVICES, INC.,
*Cross-Respondent.*

---

## CROSS-PETITION FOR A WRIT OF CERTIORARI
**To the United States Court of Appeals**
**For the Sixth Circuit**

---

Cross-petitioners respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 10, 1984.[1]

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit entered on July 10, 1984, is reported at

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1. Cross-petitioners are Clevester Davis, Jimmie Lee King, Virginia Ann King, and the class which they represent, 44 individuals. Cross-respondent is Avco Financial Services, Inc. Cross-petitioners do not seek a writ of certiorari against defendant Lee McCormick. The Court of Appeals for the Sixth Circuit held that defendant Lee McCormick was personally liable under the analysis adopted by that court.

739 F.2d 1057 (Pet's App. A).[2] The findings of fact and conclusions of law of the United States District Court for the Northern District of Ohio, Western Division, entered on March 30, 1981, is unreported (Appendix B). The judgment of the district court entered on March 30, 1981 is unreported (Pet's App. D, *infra*). The order of the Court of Appeals for the Sixth Circuit entered on October 29, 1981, dismissing the appeal of Avco Corporation is unreported (Appendix E, *infra*). The district court memorandum and order filed August 13, 1982, and amended judgment filed August 16, 1982, ruling on AFS's Rule 60(b) motion is unreported (Appendices F and G, *infra*). The order of the Court of Appeals for the Sixth Circuit entered July 10, 1984, overruling plaintiffs' motion to dismiss is unreported (Appendix H, *infra*).

## JURISDICTION

The judgment, opinion and order of the Court of Appeals were entered on July 10, 1984. Cross-petitions for rehearing and suggestions of rehearing *en banc* were denied by order entered September 7, 1984. A petition for writ of certiorari was filed by Avco Financial Services, Inc. on December 5, 1984. That petition was received by cross-petitioners on December 7, 1984. The cross-petition is filed pursuant to S.Ct. Rule 19.5. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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2. Cross-respondent Avco Financial Services, Inc. filed in this case a petition for writ of certiorari, No. 84-901. This cross-petition adopts as its own the following appendices to the petition in No. 84-901: Appendices A, B and C. References to those appendices are "Pet's App.".

## STATUTES AND RULES INVOLVED

Section 2(1) of the Securities Act of 1933, 15 U.S.C. §77b(1), provides in pertinent part:

When used in this subchapter, unless the context otherwise requires:

(1) The term "security" means any note, . . . . or, in general, any interest or instrument commonly known as a "security". . . .

Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10) provides in pertinent part:

(a) When used in this chapter, unless the context otherwise requires—

* * * * *

(10) The term "security" means any note, stock, treasury stock, bond . . . but shall not include currency or any note, draft, bill of exchange or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months . . . .

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), provides in pertinent part:

It shall be unlawful for any person . . .

(b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors.

Securities Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5 (1984), states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 4, Fed.R.App.P., provides in pertinent part:

(a)(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from....

Rule 60, Fed.R.Civ.P., provides in pertinent part:

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders....

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation . . . .

## STATEMENT OF THE CASE

### Facts and Claims

This is a securities fraud class action arising out of the activities of defendant Avco Financial Services, Inc. (AFS) and the manager of its Toledo, Ohio office, Lee McCormick. AFS lent money to the plaintiffs to enable them to invest in a scheme called Dare To Be Great (DTBG). DTBG was a pyramid scheme wherein investors could buy "adventures." Purchasers of adventure Levels III (price: $2,000) and IV (price: $5,000) could sell adventures to other purchasers, and thereby collect a commission.

The sales of DTBG were based on hard-sell tactics and promises of quick wealth. Because of its inherent "saturation" character, this scheme was doomed to fail, and did so in 1974, causing members of the plaintiff class to lose nearly all of the money they had invested in it (Pet's App. 2a).

For the purpose of obtaining loan business, AFS and its branch manager McCormick, participated in and promoted DTBG. McCormick attended DTBG meetings in-

viting potential investors needing financing to obtain it from AFS. AFS employees told plaintiffs that DTBG was a "sound investment"; it was a good investment; they had investigated DTBG; it was a good program. AFS handed out blank buyer's statement forms (a pre-loan application) in the anticipation that they would be distributed to DTBG prospects needing financing. AFS's association with DTBG had the effect of endorsing DTBG. AFS financed each class member's investment in DTBG in return for that individual's execution of a promissory note.[3] The trial court found that defendants gave "supportive and enthusiastic aid" to DTBG (Pet's App. 32a).

Plaintiff Clevester Davis commenced this class action alleging four counts of federal securities laws violations. Jurisdiction was premised under the Securities Act of 1933, 15 U.S.C. §§77l, 77v, and the Securities Exchange Act of 1934, 15 U.S.C. §78aa. Defendants were AFS, Lee McCormick, AFS's parent corporation Avco Corporation, and two subsidiaries of AFS.

**District Court Findings and Conclusions**

The case was tried to the district court in 1979. At the conclusion of plaintiffs' case, Avco Corporation and the two subsidiaries of AFS were dismissed as not being involved in the DTBG financing (Pet's App. 29a). On March 30, 1981, the district court entered a judgment for the plaintiffs against the defendant AFS. The district court did not hold defendant McCormick personally liable on

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3. A more detailed discussion with references to the record of AFS's participation in and promotion of DTBG is contained in Brief for Plaintiffs-Appellees, Cross-Appellants at 10-14 (April 16, 1983) filed in the United States Court of Appeals for the Sixth Circuit.

the basis that he personally received none of the monies (App. D, A1).

The district court held that the DTBG "adventures" were "securities." It also found that the commercial setting and economic realities of the transactions made the promissory notes "securities" (Pet's App. 31a-32a). Explicitly and implicitly the court found for the plaintiffs on each of their federal securities laws claims, 15 U.S.C. §§77l(1), 77l(2), 78j(b), 78o(c) (Pet's App. 32a-33a).

**First Appeal**

From that judgment, a notice of appeal was filed naming only Avco Corporation as the appellant. Avco Financial Services, Inc. did not appeal. Plaintiffs moved to dismiss the appeal of Avco Corporation for lack of standing. On October 29, 1981, the Court of Appeals dismissed for lack of jurisdiction the appeal of Avco Corporation finding that it "ha[d] no standing to appeal the final judgment of the district court which awarded judgment against Avco Financial Services, Inc." (App. E, A3).

AFS then filed in the district court a Rule 60(b), Fed.R.Civ.P., motion to vacate the March 30, 1981 final judgment and re-enter it so that AFS could file a timely notice of appeal. On August 13, 1982, the district court vacated and re-entered the judgment (App. F, A4). The nomenclature in the amended judgment entered on August 16, 1982, was "the defendant Avco Financial Services, Inc." (App. G, A6). The March 30, 1981 judgment had referred to AFS as the "defendant Avco" (App. D, A1). However, the district court's accompanying Findings of Fact and Conclusions of Law had stated "Avco Financial Services, Inc. (Avco)" (Pet's App. 30a). Substantively, the judgments were the same.

**Second Appeal**

AFS appealed from the August 16, 1982, amended judgment, and the district court's March 30, 1981 Findings of Fact and Conclusions of Law. Plaintiffs cross-appealed and moved to dismiss AFS's appeal for lack of jurisdiction.

The Court of Appeals affirmed in part and reversed in part the district court's conclusions as to securities laws violations and liabilities. It was in "total agreement" with the district court's factual findings regarding the actions and intentions of AFS manager Lee McCormick, including "actually representing to some of the borrowers that DTBG was a sound investment" (Pet's App. 7a).

The district court had found that McCormick "was suspicious of the DTBG scheme" (Pet's App. 32a). Nonetheless, the court of appeals held that the district court did not find the requisite scienter to impose Rule 10b-5 liability (Pet's App. 6a). While the court of appeals held that the DTBG adventures were securities, it concluded that the promissory notes which were executed to invest in DTBG were not (Pet's App. 9a, 23a).

In a 2-1 decision, the majority held that AFS was liable to at least some of the investors under §12(2), 15 U.S.C. §77l(2). Applying the "proximate cause" theory, the majority held that AFS would be secondarily liable to each class member who showed that defendants' activities were a substantial factor in the decision to purchase DTBG securities (Pet's App. 10a-21a). Chief Judge Lively dissented stating that only the actual sellers of the security could be held liable under §12(2) (Pet's App. 23a-27a).

Because the court of appeals reversed the district court's findings of primary liability on the AFS notes, the court of appeals remanded for factual findings as to

each class member on whether AFS was the proximate cause of the investment in DTBG. It also remanded for further findings on damages. The district court had based its damages on the finding that the AFS notes were securities. The court of appeals having reversed the district court on that issue, held that damages should be based on the amount invested in the DTBG securities, rather than based on the notes issued (Pet's App. 21a-22a).

In a separate order, the court of appeals overruled plaintiffs' motion to dismiss (App. H, A7). It acknowledged that AFS had filed Rule 60(b) motions in the district court, which were granted (App. H, A9). Nevertheless, it held that the district court had pursuant to Fed.R.Civ.P. 60(a) corrected what was essentially a clerical error in its March 30, 1981 judgment (App. H, A10).

## REASONS FOR GRANTING THE WRIT

### 1. THIS COURT SHOULD RESOLVE THE ISSUE OF WHEN "NOTES" ARE "SECURITIES"

This Court has repeatedly been called upon to determine when a particular instrument is a "security". *See, e.g., Securities Industry Association v. Board of Governors,* ..... U.S. ....., 52 U.S.L.W. 4943 (June 28, 1984); *Marine Bank v. Weaver,* 455 U.S. 551 (1982); *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975); *Tcherepnin v. Knight,* 389 U.S. 332 (1967). This case provides the opportunity for the Court to clarify when a "note" is a security.

Both the Securities Act of 1933, 15 U.S.C. §77b(1), and the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10), define "security" to include "any note". The 1934 Act

excludes from the definition of "security" any note which has a maturity "not exceeding nine months . . ." 15 U.S.C. §78c(a)(10). The definitional sections of both Acts are introduced by the language "unless the context otherwise requires . . ." 15 U.S.C. §§77b, 78c. "Note" is not defined in either statute.

The court of appeals reversed the district court's holding that the promissory notes issued to invest in DTBG were "securities." The Sixth Circuit's holding provides a very narrow reading of the term "any note" in the securities acts definitions. It does so even after acknowledging that the proceeds were used to invest in a security (DTBG) (Pet's App. 9a), and that defendants had facilitated the sale of that security by representing that DTBG was a sound investment (Pet's App. 7a).

Lower courts are divided with respect to the analysis to be undertaken in determining when "notes" or similar instruments are securities. Some courts have applied a "risk capital" test. *See Union Planters National Bank of Memphis v. Commercial Credit Business Loans, Inc.*, 651 F.2d 1174, 1181-82 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *Great Western Bank & Trust v. Kotz*, 532 F.2d 1252, 1257 (9th Cir. 1976). Other courts have applied a "commercial-investment dichotomy" test. *See National Bank of Commerce of Dallas v. All American Assurance Company*, 583 F.2d 1295, 1301 (5th Cir. 1978); *C.N.S. Enterprises, Inc. v. G. & G. Enterprises, Inc.*, 508 F.2d 1354, 1359 (7th Cir.), *cert. denied*, 423 U.S. 825 (1975); *Zabriskie v. Lewis*, 507 F.2d 546 (10th Cir. 1974); *Lino v. City Investing Co.*, 487 F.2d 689, 693-6 (3rd Cir. 1973).

The grant of cross-petitioners' writ would enable this Court to clarify when a "note" is a security within the context of the 1933 and 1934 Securities Acts. The Court

would have the opportunity to provide uniform guidelines for the lower courts to follow in determining when a note is a "security."

## 2. THE COURT SHOULD DETERMINE UNDER WHAT, IF ANY, CIRCUMSTANCES RECKLESS BEHAVIOR IS SUFFICIENT FOR CIVIL LIABILITY UNDER §10(b) AND RULE 10b-5

In *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 n.12 (1976), this Court expressly left open the question whether, in some circumstances, reckless behavior is sufficient for civil liability under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5 (1984).

The court of appeals acknowledged that in the Sixth Circuit recklessness may constitute the scienter required for §10(b) and Rule 10b-5 liability (Pet's App. 10a). Yet, it erroneously concluded that the trial court found neither deliberate fraud nor recklessness on the part of AFS or its manager (Pet's App. 11a).

In its findings of fact, the trial court found that the AFS manager "was suspicious of the DTBG scheme" (Pet's App. 32a). The record supported such a finding. AFS's manager admitted as much at trial. In response to the trial judge's question of whether he had any idea that DTBG was a pyramid franchise scheme, he stated: "As time went on I began to see what was happening, yes."

The majority of courts which have addressed the issue left unanswered in *Ernst & Ernst v. Hochfelder, supra,* have concluded that recklessness satisfies the §10(b) and Rule 10b-5 scienter requirement. *See Mansbach v. Prescott, Ball & Turben,* 598 F.2d 1017, 1023-24 (6th Cir. 1979), and cases cited therein. By granting cross-petitioners' writ, the Court

will have the opportunity to provide guidelines to the lower courts as to the circumstances, if any, under which reckless behavior satisfies the scienter requirement for civil liability.

### 3. THE LOWER COURTS HAVE PERMITTED RULE 60, FED.R.CIV.P., TO BE USED AS A SUBSTITUTE FOR A TIMELY AND PROPER APPEAL—THIS IS CONTRARY TO ACCEPTED PRACTICE, THUS CALLING FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Avco Financial Services, Inc. failed to perfect a timely appeal from the district court's March 30, 1981 judgment as required by Rule 4(a), Fed.R.App.P. Upon AFS's Rule 60, Fed.R.Civ.P., motion, the district court vacated its March 30, 1981 judgment (App. D, A1), and re-entered it (Amended Judgment, August 16, 1982, App. G, A6) to enable AFS to perfect an appeal. The court of appeals sanctioned this in its July 10, 1984 Order (App. H, A7). Although the appellate court in that order held that the district court had corrected what was essentially a "clerical error," that was not the case. Prior to that order, no party or court had contended that there was any "clerical error" in the March 30, 1981 judgment. In its Rule 60 motion, AFS made no such contention. There was no clerical error. Even the prior panel of the Sixth Circuit, which had dismissed AVCO Corporation's appeal, recognized that the March 30, 1981 district court judgment was "against defendant AVCO Financial Services, Inc." (App. E, A3).

The law is well-established that a "party may not use Rule 60 as a substitute for a timely and proper appeal. *Ackermann v. United States,* 340 U.S. 193 (1950). . ." *Park*

*v. U.S. Life & Credit Corp.*, 677 F.2d 838, 840, *reh. en banc denied*, 685 F.2d 1389 (11th Cir. 1982). *Accord, United States v. O'Neil*, 709 F.2d 361, 372 (5th Cir. 1983). *See also*, 7 MOORE'S FEDERAL PRACTICE §60.30[1] (2d ed. 1983). The district court and court of appeals, however, in this case have permitted Rule 60 to be used precisely for that purpose. A notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. Rule 4(a), Fed.R.App.P. This 30 day time limit is mandatory and jurisdictional. *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 264 (1978). "Rule 60(b) cannot be used to circumvent its procedures, which embody the significant principle of protecting the finality of judgments." *United States v. O'Neil, supra*, 709 F.2d at 373. *Cf. Needham v. White Laboratories, Inc.*, 454 U.S. 927 (1981) (Justice Rehnquist dissenting from denial of petition for writ) (a motion to reconsider cannot extend the time for filing a notice of appeal).

The lower courts improperly permitted Rule 60 to be used to extend the time for taking an appeal. This Court should grant the cross-petition for writ so as to exercise its power of supervision over this departure from the accepted and usual course of judicial proceedings.

## CONCLUSION

For the reasons stated above, this cross-petition for writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX D

### District Court Judgment

(Filed March 30, 1981)

Civil Action File No. C 73-226

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

---

CLEVESTER DAVIS, *et al.*,

VS.

AVCO CORPORATION, *et al.*

---

JUDGMENT

This action came on for trial before the Court, Honorable Nicholas J. Walinski, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged judgment for the plaintiffs sum of $167,072,57 against the defendant AVCO. Defendant McCormick received none of the monies, nor did he have the use of them during the pendency of this lawsuit. Plaintiffs are relieved of any and all obligations and liability which arose for loans or portions of loans made for the purpose of investing in Dare To Be Great.

/s/ NICHOLAS J. WALINSKI
*United States District Judge*

## APPENDIX E

**Court of Appeals Order**

(Filed October 29, 1981)

No. 81-3253

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

CLEVESTER DAVIS, *et al.*,
*Plaintiffs-Appellees, Cross-Appellants,*

v.

AVCO CORPORATION,
*Defendant-Appellant Cross-Appellee.*

---

ORDER

BEFORE: KENNEDY, MARTIN and JONES, *Circuit Judges*

This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the record, motions and responses filed in this case, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

This matter is before the Court upon consideration of plaintiffs' motion to dismiss this case for lack of jurisdiction because AVCO Corporation does not have standing to appeal. Also under consideration are defendant's motions to amend the notice of appeal, to remand this case to the district court, and to stay consideration of plaintiffs' motion to dismiss.

On March 30, 1981, the district court rendered its findings of fact, conclusions of law, and judgment in this

case. The district court judgment awarded $167,072.57 against defendant AVCO Financial Services, Inc., and in favor of plaintiffs.

AVCO Corporation was a defendant in the proceedings which originated in the district court, but had been dismissed as a defendant several months before the date of the district court's final judgment. AVCO Corporation and AVCO Financial Services, Inc., are two separate and distinct corporate entities.

On April 29, 1981, AVCO Corporation filed a notice of appeal to the district court's judgment of March 30, 1981. It appearing that AVCO Corporation received all of the relief it requested in the district court, AVCO Corporation has no standing to appeal the final judgment of the district court which awarded judgment against AVCO Financial Services, Inc.

Whenever standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, an injury may be shown that is likely to be redressed by a favorable decision of this Court. *See Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976). AVCO Corporation has shown no injury due to the judgment of the district court against AVCO Financial Services, Inc., thus, there is no injury to be redressed by a decision of this Court. Accordingly, it is ORDERED that this case be, and it hereby is, dismissed for lack of jurisdiction. Rule 9(d)1, Rules of the Sixth Circuit. It is further ORDERED that defendant's motions to remand this case to the district court, to amend the notice of appeal, and to stay consideration of plaintiffs' motion to dismiss, be and they hereby are, denied as moot.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
*Clerk*

## APPENDIX F

**District Court Memorandum and Order**

(Filed August 13, 1982)

No. C 73-226

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

---

CLEVESTER DAVIS, etc., *et al.*,
*Plaintiff,*

VS.

AVCO CORPORATION, *et al.*,
*Defendant.*

---

MEMORANDUM AND ORDER

WALINSKI, *J.*:

This cause is before the Court on defendants renewed motions to vacate the final judgment, for relief from the final judgment, and for reentry of judgment correctly designating Avco Financial Services, Inc. as the proper defendant.

The Court has reviewed the motions and memoranda of the parties and deems the motions well taken and the motions to vacate and for relief are granted.

Accordingly, the judgment of March 30, 1981 is vacated. Judgment is entered in favor of the plaintiffs and against the defendant Avco Financial Services, Inc. in the sum of $167,072.57. Plaintiffs are relieved of any and

all obligations and liability which arose for loans or portions of loans made by Avco Financial Services, Inc. for the purpose of investing in Dare To Be Great.

IT IS SO ORDERED.

/s/ NICHOLAS J. WALINSKI
*United States District Judge*

## APPENDIX G

### District Court Amended Judgment

(Filed August 16, 1982)

Civil Action Docket No. C73-226

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

---

CLEVESTER DAVIS, INDV. etc., *et al.*,
*Plaintiffs,*

vs.

AVCO FINANCIAL SERVICES, INC.,
*Defendant.*

---

AMENDED JUDGMENT

This action came on for trial before the court, United States District Judge Nicholas J. Walinski presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged that the judgment of March 30, 1981, is vacated. Judgment is entered in favor of the plaintiffs and against the defendant AVCO Financial Services, Inc. in the sum of $167,072.57. Plaintiffs are relieved of any and all obligations and liability which arose for loans or portions of loans made by AVCO Financial Services, Inc. for the purpose of investing in Dare To Be Great.

/s/ NICHOLAS J. WALINSKI
*United States District Judge*

## APPENDIX H

### Court of Appeals Order

(Filed July 10, 1984)

(NOT RECOMMENDED FOR FULL-TEXT PUBLICATION [reference to Sixth Circuit Rule 24])

82-3553

82-3572

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

---

CLEVESTER DAVIS; JIMMIE LEE KING; and VIRGINIA ANN KING,
*Plaintiffs-Appellees, Cross-Appellants,*

v.

AVCO FINANCIAL SERVICES, INC.,
*Defendant-Appellant,*
LEE McCORMICK,
*Defendant.*

---

ORDER

Before: LIVELY, *Chief Circuit Judge,* JONES, *Circuit Judge,* and BERTELSMAN, *District Judge**

This securities fraud case was initiated in 1973. The original defendants included Avco Financial Services, Inc. and other Avco subsidiaries and affiliates, which were separate corporate entities.

Trial began before District Judge Walinski of the Northern District of Ohio on August 3, 1979. At the

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*Hon. William O. Bertelsman, Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

conclusion of the plaintiffs' case, the other Avco subsidiaries and affiliates were dismissed, leaving only Avco Financial Services, Inc. and its manager Lee McCormick as defendants.

On March 30, 1981, the district court entered its judgment in favor of the plaintiffs for $167,072.57 against "the defendant AVCO."

On April 29, 1981, defendants' counsel filed its notice of appeal. The notice stated that "[n]otice is hereby given that defendant AVCO Corporation" appealed from the district court's March 30th judgment. In June 1981 the plaintiffs filed a motion with this court to dismiss "AVCO Corporation's" appeal for lack of jurisdiction, since "AVCO Corporation" had prevailed at the district court level and therefore lacked standing to appeal.

Defendants' counsel responded to the plaintiffs' motion to dismiss by filing two sets of motions, one with this court and another with the district court. Defendants requested this court to stay consideration of plaintiffs' motion to dismiss, to amend the April 29 notice of appeal to substitute "AVCO Financial Services, Inc." as appellant in place of "AVCO Corporation," and to remand the case to the district court to enable the district court to act upon defendants' F.R.Civ.P. 60(a) and (b) motions.

The defendants' Rule 60(a) and (b) motions filed with the district court requested that court to grant relief from its March 30th judgment, to correct the defendants' notice of appeal, to relieve the defendants from the proceeding of the notice of appeal, and/or to reconsider and vacate the March 30th judgment. In July 1981, Judge Walinski filed an affidavit with this court that he was favorably disposed toward the defendants' Rule 60 motions.

This court dismissed "AVCO Corporation's" appeal in October 1981. We found that because Avco Corporation was not injured by the district court's judgment against Avco Financial Services, it lacked standing to appeal that judgment. We therefore ordered that Avco Corporation's appeal be dismissed for lack of jurisdiction. We further ordered that Avco Corporation's motion to remand the case to the district court, to amend the notice of appeal, and to stay consideration of plaintiff's motion to dismiss were *denied as moot*. (emphasis supplied).

Following this court's disposition of Avco Corporation's appeal, defendants renewed their Rule 60(b) motions before the district court. In August, 1982 the district court granted those motions. Accordingly, the district court vacated its March 30, 1981 judgment, and on August 16, 1982 entered a nearly identical revised judgment in plaintiff's favor against "defendant AVCO Financial Services, Inc." Defendants subsequently filed a timely notice of appeal from the district court's August 16th amended judgment.

## DISCUSSION

Plaintiff's now argue that Avco Corporation's April 29, 1981 notice of appeal deprived the district court of jurisdiction to rule on defendants' Rule 60 motions and it was therefore an abuse of discretion for that court to enter its revised order of August 16, 1982. Plaintiffs contend that the district court in effect improperly used Rule 60 to perfect the defendants' appeal and therefore the appeal is improper and this court lacks jurisdiction because the appeal was not timely under Rule 4 of the Rules of Appellate Procedure.

We find that the district court acted within its discretion under F.R.Civ.P. 60(a) in correcting what was es-

sentially a clerical error in the March 30, 1981 judgment. Rule 60(a) permits a district court to correct mistakes in judgments on the motion of any party or on its own initiative.

During the pendency of an appeal after an appeal is docketed, under Rule 60(a) a district court may make corrections with the leave of the appellate court. Under the facts of this case, we previously found that this court lacked jurisdiction over Avco Corporation's purported appeal. Thus, in retrospect, the district court regained jurisdiction over this case and acted within its discretion in amending the March 30th judgments since there was no longer any appeal pending before this court once Avco Corporation's appeal had been dismissed.

Since the district court's revised judgment of August 16, 1982 was within its discretion, defendants' August 30, 1982 notice of appeal was timely under Rule 4 of the Rules of Appellate Procedure. Accordingly, we overrule plaintiffs' motion to dismiss the appeal of Avco Financial Services, Inc.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
*Clerk*

No. 84-1087

Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

CLEVESTER DAVIS, JIMMIE LEE KING, and VIRGINIA KING,

Cross-Petitioners,

v.

AVCO FINANCIAL SERVICES, INC.,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

## CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM 1984**

---

No. 84-1087

---

CLEVESTER DAVIS, JIMMIE LEE KING, and VIRGINIA KING,

Cross-Petitioners,

v.

AVCO FINANCIAL SERVICES, INC.,

Cross-Respondent.

---

**On Cross-Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit**

---

## CROSS-RESPONDENT'S BRIEF IN OPPOSITION

---

Cross-Respondent Avco Financial Services, Inc. (hereinafter "AFS"), opposes the cross-petition for a writ of certiorari because there are no special or important reasons warranting this Court's review of the three questions presented.

## STATEMENT OF THE CASE

AFS respectfully refers the Court to the Statement of the Case contained within AFS' own Petition in Case No. 84-901. That provides an objective, neutral, and accurate description of the proceedings below.

## THE CROSS-PETITION SHOULD BE DENIED

### I. There Is No Reason – Particularly In This Case – For This Court To Decide Once Again What Constitutes A Security

Cross-petitioners seem to want this Court to define once again what constitutes a "security" for the purposes of the federal securities laws. As even they observed, it has done so repeatedly in the past. *See* Cross-Petition at p. 9 and cases cited therein. *See also International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 558 (1979); *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 301 (1946).

Cross-petitioners have failed to present a single reason why this Court should go through that exercise yet again. The test is well-settled, and its application necessarily differs with the facts of each particular case. *See Marine Bank* v. *Weaver*, 455 U.S. 551, 560 n. 11 (1982). That circumstance, however, does not mean that each new set of facts in each new case warrants or justifies this Court's review.

The simple fact is: Cross-petitioners have not and could not have contended that the unanimous holding of the Sixth Circuit on the question presented was in conflict with a decision of any other Circuit or of this Court. It is not, and cross-petitioners do not maintain that it is.

What, then, is the purpose for this Court's review? Cross-petitioners seem to suggest that this Court should decide which "test" – the "risk capital" or the "commercial-investment dichotomy" – should apply in determining whether notes made by an individual when borrowing money are securities. However, they do not say which "test" is right, which is "wrong," or which supports their view of the case.

These glaring omissions are understandable. Within the context of individual loans, the analytical distinction cross-petitioners discuss is one of semantics rather than substance. *Compare Amfac Mortgage Corp.* v. *Arizona Mall of Tempe*,

*Inc.*, 583 F.2d 426 (9th Cir. 1978) (risk capital), *with*, *McGovern Plaza Joint Venture* v. *First of Denver Mortgage Investors*, 562 F.2d 645 (10th Cir. 1977) (commercial-investment dichotomy) (both cases holding that instruments evidencing a construction loan were not securities). And, under either "test," documents evidencing individual loans are not securities. *See Union Planters National Bank of Memphis* v. *Commercial Credit Business Loans, Inc.*, 651 F.2d 1174 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981) (risk capital); *Great Western Bank & Trust* v. *Kotz*, 532 F.2d 1252 (9th Cir. 1976) (risk capital); *National Bank of Commerce of Dallas* v. *All American Assurance Company*, 583 F.2d 1295 (5th Cir. 1978) (commercial-investment dichotomy); *C.N.S. Enterprises, Inc.* v. *G & G Enterprises, Inc.*, 508 F.2d 1354 (7th Cir.), *cert. denied*, 423 U.S. 825 (1975) (commercial-investment dichotomy); *Lino* v. *City Investing Co.*, 487 F.2d 689 (3rd Cir. 1973) (commercial-investment dichotomy); *Chemical Bank* v. *Arthur Andersen & Co.*, 726 F.2d 930 (2d Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 253, 83 L. Ed. 2d 190 (1984) (all "tests").

In short, cross-petitioners want this Court to decide an issue which necessarily would not affect the result below. That has never been a reason for issuing a writ of certiorari.

## II. There Is No Reason – Particularly In This Case – For This Court To Decide Whether Recklessness Is Sufficient For Liability Under § 10(b) Of The Securities Act Of 1934 And Rule 10b-5 Promulgated Thereunder

Cross-petitioners' second question presented for this Court's review is:

> Whether under certain circumstances reckless behavior is sufficient for civil liability under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.

By the nature of this question, one would presume (1) that cross-petitioners presented evidence sufficient for a finding of recklessness, but (2) that the Sixth Circuit, in a decision conflicting with that of one or more other Circuits or of this Court, held that recklessness was insufficient for liability under Rule 10b-5. However, neither circumstance exists here. The majority opinion states:

> Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 provide a private action remedy roughly equivalent to that existing for fraud at common law. This remedy is not limited to "sellers," but applies also to persons collaterally involved in the transaction who made misrepresentations to promote the sale of securities with the requisite scienter. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976). In this circuit recklessness may constitute the required scienter. *Mansbach* v. *Prescott, Ball & Turben*, 598 F.2d 1017, 1023 (6th Cir. 1979); *Ingram Industries* v. *Nowicki*, 502 F. Supp. 1060, 1066 (E.D. Ky. 1980). However, the trial judge found neither deliberate fraud nor recklessness on the part of Avco or its manager. Therefore, plaintiff's 10b-5 allegations were not supported by the evidence at trial.*

---

* *See* Appendix A to AFS' Petition in Case No. 84-901 at pp. 10a-11a. Chief Judge Lively concurred in this holding. *See* Petition in Case No. 84-901 at p. 23a.

Thus, the "question" cross-petitioners present does not exist in this case. Whether recklessness is or is not sufficient for liability under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 would not affect or be determinative of the result below. Fundamentally, cross-petitioners want an "advisory opinion." That is hardly a reason for issuing the writ.

Cross-petitioners' real point seems to be that they disagree with the decision of the District Judge and the three judges of the Sixth Circuit that there was insufficient evidence to support a finding or conclusion of recklessness. In other words, all cross-petitioners want is a determination by this Court that Judges Lively, Jones, Bertelsman, and Walinsky did not sufficiently or correctly examine, weigh, or review the evidence in this case.

Once again, that is not a reason warranting the issuance of a writ. This Court does "not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). *See also Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 447 (1959) (Frankfurter, J., dissenting).

### III. The Unpublished Order Denying The Motion To Dismiss Presents No Important Or Significant Questions

Cross-petitioners' final question pertains to the Sixth Circuit's unanimous decision and order denying their motion to dismiss the appeal. On this cross-petition for a writ of certiorari, the fundamental question is whether the Sixth Circuit decision under attack is "of importance to the public as distinguished from that of the parties . . ." *N.L.R.B.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) (*quoting Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 (1923)).

By its terms, the order denying cross-petitioners' motion is

only of significance to the parties to this case. It is an unpublished decision expressly governed by Sixth Circuit Rule 24 which provides in pertinent part:

> (a) *Criteria for Publication*
>
> (1) It is the policy of the court that the following criteria shall be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter:
>
> > (i) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;
> >
> > (ii) whether it creates or resolves a conflict of authority either within the circuit or between this circuit and another;
> >
> > (iii) whether it discusses a legal or factual issue of continuing public interest;
> >
> > (iv) whether it is accompanied by a concurring or dissenting opinion;
> >
> > (v) whether it reverses the decision below, unless:
> >
> > > (a) the reversal is caused by an intervening change in law or fact, or,
> > >
> > > (b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;
> >
> > (vi) whether it addresses a lower court or administrative agency decision that has been published; or,
> >
> > (vii) whether it is a decision which has been reviewed by the United States Supreme Court.
>
> (2) *Designation for Publication.* There shall be a presumption in favor of publication of signed and per curiam

> opinions. Such opinions shall be designated for publication unless a majority of the panel deciding the case determines otherwise upon consideration of the foregoing criteria. An order shall not be designated for publication unless a member of the panel so requests.
>
> (b) *Citation of Unpublished Decisions.* Citation of unpublished decision by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

Cross-petitioners are complaining about what is essentially a housekeeping order. On its face, it presents no question or issue of importance. Under the Sixth Circuit's own procedural rules, it has little if any precedential value. In the circumstances, it most assuredly does not warrant the attention of this Court.

Cross-Petitioners seek to make the question one of general importance by saying that this procedural order conflicts with *Ackermann* v. *United States*, 340 U.S. 193 (1950). But no conflict exists.

In *Ackermann* this Court held that Civil Rule 60 does not provide relief from a party's own " 'free, calculated, deliberate choice' not to appeal." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (*quoting Ackermann*, 340 U.S. at 198). *See also Parks* v. *U.S. Life & Credit Co.*, 677 F.2d 838, 840 (11th Cir. 1982) ("An unsuccessful litigant may not rely on appeals by others and share in the fruits of victory by way of a Rule 60(b) motion.").

However, when a litigant has *not* freely or deliberately decided not to appeal, Civil Rule 60 "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," *Klapprott* v. *United States*, 335 U.S. 601, 614-15 (1949). Accordingly, Civil Rule 60 can appropriately result in an extension of the time for appeal when special circumstances exist and no

prejudice results to the opposing party. *See e.g., Buckeye Cellulose Corp.* v. *Braggs Electric Construction Co.*, 569 F.2d 1036 (8th Cir. 1978); *Fidelity & Deposit Co.* v. *Usaform Hail Pool, Inc.*, 523 F.2d 744 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institute*, 500 F.2d 808 (D.C. Cir. 1974).

This Court has stated that rulings under Civil Rule 60 are reviewable "only for abuse of discretion." *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 263 n. 7 (1978). That is the sole question cross-petitioners have raised: Did the District Judge and then the three judges of the Sixth Circuit abuse their discretion? Fundamentally, all cross-petitioners want is this Court to review the same record as the Sixth Circuit for an alleged abuse of discretion. That is no reason for issuing a writ.

In any event, there was no abuse here. There was no evidence or even a contention that AFS made a "free, calculated, or deliberate choice" not to appeal and, therefore, this Court's holding in *Ackermann* is inapplicable. All that occurred was a minor error in a timely filed notice of appeal.

The facts are: (1) Avco Corporation and all of its subsidiaries, including AFS, were represented by the same attorneys in the District Court; (2) at the conclusion of plaintiffs' case, all defendants were dismissed except for AFS and Lee McCormick; (3) the District Court's findings of fact and conclusions of law dismissed Lee McCormick and left AFS as the *only* defendant; (4) judgment was entered against "Avco"; and (5) the attorneys for Avco Corporation and its subsidiaries filed a timely notice of appeal.

This whole matter is nothing more than a tempest in a teapot. During oral argument before the Sixth Circuit, cross-petitioners' counsel acknowledged that he knew that AFS was the only remaining defendant and that defense counsel had obviously intended that AFS be the appellant. In short, there was no prejudice here. The District Judge found only

one defendant liable; the attorneys for that defendant filed a timely notice of appeal; and the plaintiffs, through their counsel, knew who was really appealing.

The designation of Avco Corporation as appellant in the notice did not in these circumstances deprive cross-petitioners of fair notice of the appeal. The original notice was sufficient, and the error could have been corrected in the court of appeals. *Harrison* v. *United States*, 715 F.2d 1311 (8th Cir. 1983) (court of appeals mandate recalled and amended to include party whose name was inadvertently omitted from notice of appeal in consolidated cases); *United States* v. *Uni Oil, Inc.*, 710 F.2d 1078, 1080 n.1 (5th Cir. 1983) (government's notice of appeal from dismissal of indictment held not defective as to defendants omitted from notice caption when government "plainly demonstrated an intention to appeal from the entire order").

As with their first two, cross-petitioners' third question does not and cannot impact anyone but the parties to this case. Fundamentally, all cross-petitioners seek is a review of the record to determine whether the four judges below abused their discretion. The cross-petition should be denied.*

---

* Cross-petitioners, AFS submits, are hardly in a position to argue timeliness before this Court. All petitions for rehearing were denied by the Sixth Circuit on September 7, 1984. AFS petitioned this Court on December 5, 1984 for a writ to review the judgment and opinion of the Sixth Circuit in favor of cross-petitioners and against AFS [1a]. AFS did not petition from the order denying cross-petitioners' motion to dismiss [3a.] The time for petitioning to this Court is ninety days after a Circuit's denial of a petition for rehearing or thirty days after an earlier petition from the same judgment or order. *See* 28 U.S.C. § 2101(c); Supreme Court Rule 20. The "cross-petition" here was filed on January 2, 1985 — well beyond the ninety-day limitation.

## CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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## APPENDIX A

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NOS. 82-3553
82-3572

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

[Filed July 10, 1984]

---

CLEVESTER DAVIS; JIMMIE LEE KING; and VIRGINIA ANN KING,

Plaintiffs-Appellees,
Cross-Appellants,

v.

AVCO FINANCIAL SERVICES, INC.,

Defendant-Appellant,
Cross Appellee,

LEE McCORMICK,

Defendant.

---

Before: LIVELY, Chief Judge; JONES, Circuit Judge; and BERTELSMAN, District Judge.

### JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that this case is affirmed with regard to the findings of liability of certain class members under § 12(2) and reversed and remanded for further proceedings indicated in this opinion.

Each party is to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ JOHN P. HEHMAN, Clerk

ISSUED AS MANDATE: September 17, 1984
COSTS: None

## APPENDIX B

---

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court.
This notice is to be *prominently* displayed if this decision is reproduced.

82-3553
82-3572

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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[Filed July 10, 1984]

---

CLEVESTER DAVIS; JIMMIE LEE KING;
and VIRGINIA ANN KING,
Plaintiffs-Appellees,
Cross-Appellants,

v.

AVCO FINANCIAL SERVICES, INC.,
Defendant-Appellant,

LEE McCORMICK,
Defendant.

---

## ORDER

---

Before: LIVELY, Chief Circuit Judge, JONES, Circuit Judge, and BERTELSMAN, District Judge*

---

* Hon. William O. Bertelsman, Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

This securities fraud case was initiated in 1973. The original defendants included Avco Financial Services, Inc. and other Avco subsidiaries and affiliates, which were separate corporate entities.

Trial began before District Judge Walinski of the Northern District of Ohio on August 3, 1979. At the conclusion of the plaintiffs' case, the other Avco subsidiaries and affiliates were dismissed, leaving only Avco Financial Services, Inc. and its manager Lee McCormick as defendants.

On March 30, 1981, the district court entered its judgment in favor of the plaintiffs for $167,072.57 against "the defendant AVCO."

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Defendants' counsel responded to the plaintiffs' motion to dismiss by filing two sets of motions, one with this court and another with the district court. Defendants requested this court to stay consideration of plaintiffs' motion to dismiss, to amend the April 29 notice of appeal to substitute "AVCO Financial Services, Inc." as appellant in place of "AVCO Corporation," and to remand the case to the district court to enable the district court to act upon defendants' F.R.Civ.P. 60(a) and (b) motions.

The defendants' Rule 60(a) and (b) motions filed with the district court requested that court to grant relief from its March 30th judgment, to correct the defendants' notice of appeal, to relieve the defendants from the proceeding of the notice of appeal, and/or to reconsider and vacate the

March 30th judgment. In July 1981, Judge Walinski filed an affidavit with this court that he was favorably disposed toward the defendants' Rule 60 motions.

This court dismissed "AVCO Corporation's" appeal in October 1981. We found that because Avco Corporation was not injured by the district court's judgment against Avco Financial Services, it lacked standing to appeal that judgment. We therefore ordered that Avco Corporation's appeal be dismissed for lack of jurisdiction. We further ordered that Avco Corporation's motions to remand the case to the district court, to amend the notice of appeal, and to stay consideration of plaintiff's motion to dismiss were *denied as moot.* (emphasis supplied).

Following this court's disposition of Avco Corporation's appeal, defendants renewed their Rule 60(b) motions before the district court. In August, 1982 the district court granted those motions. Accordingly, the district court vacated its March 30, 1981 judgment, and on August 16, 1982 entered a nearly identical revised judgment in plaintiff's favor against "defendant AVCO Financial Services, Inc." Defendants subsequently filed a timely notice of appeal from the district court's August 16th amended judgment.

## DISCUSSION

Plaintiffs now argue that Avco Corporation's April 29, 1981 notice of appeal deprived the district court of jurisdiction to rule on defendants' Rule 60 motions and it was therefore an abuse of discretion for that court to enter its revised order of August 16, 1982. Plaintiffs contend that the district court in effect improperly used Rule 60 to perfect the defendants' appeal and therefore the appeal is improper and this court lacks jurisdiction because the appeal was not timely under Rule 4 of the Rules of Appellate Procedure.

We find that the district court acted within its discretion

under F.R.Civ.P. 60(a) in correcting what was essentially a clerical error in the March 30, 1981 judgment. Rule 60(a) permits a district court to correct mistakes in judgments on the motion of any party or on its own initiative.

During the pendency of an appeal after an appeal is docketed, under Rule 60(a) a district court may make corrections with the leave of the appellate court. Under the facts of this case, we previously found that this court lacked jurisdiction over Avco Corporation's purported appeal. Thus, in retrospect, the district court regained jurisdiction over this case and acted within its discretion in amending the March 30th judgments since there was no longer any appeal pending before this court once Avco Corporation's appeal had been dismissed.

Since the district court's revised judgment of August 16, 1982 was within its discretion, defendants' August 30, 1982 notice of appeal was timely under Rule 4 of the Rules of Appellate Procedure. Accordingly, we overrule plaintiffs' motion to dismiss the appeal of Avco Financial Services, Inc.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN, Clerk